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Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF HUNGARIAN JEWS AND BOUGAINVILLEANS FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF HUNGARIAN JEWS AND BOUGAINVILLEANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the plaintiffs in *Rosner v. United States of America*, Case No. 01-1859-CIV-SEITZ, presently pending in U.S. District Court in the Southern District of Florida, 231 F. Supp. 2d 1202 (hereinafter "Hungarian Jews"), and the plaintiffs in *Sarei v. Rio Tinto*, Case No. 00-11695-MMM, reported at 221 F. Supp. 2d 1116, and which is presently pending in the Ninth Circuit Court of Appeals (hereinafter "Bougainvilleans"), respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners.

The United States has consented to the filing of this brief. Counsel for Petitioner Rasul, *et al.*, has also consented to the filing of this brief. Counsel for *amici* has attempted to contact counsel for the other Petitioners by telephone to obtain Petitioners' consent. Counsel was referred to additional counsel in an effort to coordinate *amici* filings and obtain consent. To date, counsel has not been able to obtain the remaining Petitioners' consent, thereby necessitating the filing of this motion.

The Hungarian Jews, which include U.S. citizens as well as resident and nonresident aliens, allege in their lawsuit that their personal possessions and family heirlooms were accepted into protective custody in occupied Austria by the United States Army in 1945 after World War II had ended. The United States failed to return the property or pay them any compensation for their property. Among other things, the Hungarian Jews have asserted takings claims and other claims against the United States under the Little Tucker Act, the Fifth Amendment, and the Administrative Procedures Act.

The Bougainvilleans are involved in an Alien Tort Statute, 28 U.S.C. § 1350, case and have asserted claims of genocide, war crimes, racial discrimination, and crimes against humanity, among other things, against Rio Tinto, a private corporation. The case is *Sarei v. Rio Tinto*, Case No. 00-11695-MMM, and is discussed in a decision reported at 221 F. Supp. 2d 1116 (C.D. Cal.).

Amici's interest in this case stems from the D.C. Circuit's ruling that no alien can assert any constitutional claim in federal court or receive any constitutional protections without actually being in the country or having property in the United States. The D.C. Circuit made this ruling while assuming that at least some of the Petitioners are *alien friends*. The D.C. Circuit elaborated further, announcing a broad and rigid rule that all foreigners — persons and corporations, friendly and enemy alike — who lack any "property or presence in this country [have] no constitutional rights, under the due process clause or otherwise." 321 F.3d 1134, 1141 (D.C. Cir. 2003). Additionally, the D.C. Circuit explained that "the [federal] courts are not open" to such aliens *for any claim* and therefore, the claims must be dismissed for lack of jurisdiction. *Amici* are concerned that these rulings, which were all issued in the context of a habeas corpus petition and the criminal context, will undo the longstanding precedent of this Court that nonresident aliens are entitled to due process, access to the courts, and constitutional protections including those protected by the Just Compensation Clause. Such a sweeping ruling has the potential to set aside dozens of cases now pending in the federal courts, including the cases of the Hungarian Jews and Bougainvilleans.

For the foregoing reasons, Hungarian Jews and Bougainvilleans respectfully request that they be permitted to participate in this case by filing the attached brief.

Respectfully submitted,

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BRIEF OF U.S. CITIZENS AND ALIEN FRIENDS REPRESENTING HUNGARIAN JEWS AND BOUGAINVILLEANS

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Hungarian Jews and Bougainvilleans are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

Amici curiae Hungarian Jews and Bougainvilleans hereby incorporate by reference the Statement of the Case contained in Petitioners' brief.

In brief, in the underlying action, the Court is considering whether aliens, be they enemies or friends, can challenge the legality of their detention at Guantanamo Naval Base, Cuba ("Guantanamo"). The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a complaint brought by Petitioners for lack of jurisdiction based on an incorrect reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court held that 21 German nationals who were convicted of engaging in military activity against the United States in World War II — enemy aliens — could not use the Great Writ of habeas corpus to challenge their convictions for war crimes, which was convened before a military tribunal in Germany, in a U.S. civilian court. The D.C. Circuit, while

1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

assuming that at least some of the Petitioners are *alien friends*, however construed *Eisentrager* to reflect the proposition that constitutional guarantees do not apply and are not "held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." 321 F.3d 1134, 1141 (D.C. Cir. 2003). The D.C. Circuit elaborated further, explaining its erroneous position, that *Eisentrager* announced a broad and rigid rule reminiscent of Jim Crow era laws that all foreigners — persons and corporations, friendly and enemy alike — who lack any " 'property or presence in this country [have] no constitutional rights, under the due process clause or otherwise.' " *Id.* at 1141. Based on this reading of *Eisentrager* and subsequent decisions of this Court, the D.C. Circuit upheld the dismissal of Petitioners' complaint for lack of jurisdiction. It is this legal proposition — that nonresident aliens are not entitled to due process, access to the courts, or any constitutional protections — that *amici* take issue with and address herein.

SUMMARY OF ARGUMENT

Under certain circumstances, nonresident aliens are entitled to specific constitutional protections under the Fifth Amendment, including due process of law, and are entitled to assert claims in U.S. courts. The D.C. Circuit erred in holding that nonresident aliens cannot assert constitutional claims or any claim in the federal courts.

The D.C. Circuit, while assuming that at least some of the Petitioners are *alien friends*, construed this Court's decision in *Eisentrager* to reflect the proposition that constitutional guarantees are not "held by aliens outside the sovereign territory of the United States, regardless of whether

they are enemy aliens." 321 F.3d 1134, 1140 (D.C. Cir. 2003). The court announced a broad and rigid rule that all foreigners — persons and corporations, friendly and enemy alike — who lack any "property or presence in this country [have] no constitutional rights, under the due process clause or otherwise." *Id.* at 1141. The D.C. Circuit's holding went even further in denying Petitioners other claims which are also cognizable in federal courts, and explained that as to these people, the courthouse doors are closed. *Id.* at 1145.

1. The federal courts of the United States have been open to nonresident aliens since the Judiciary Act of 1789, when the courts were created. Originally, Congress granted aliens access to the federal courts under both sections 9 and 11 of the Act. The prior being the predecessor to the Alien Tort Statute, 28 U.S.C. § 1350, and the latter being so-called diversity jurisdiction. Similarly, an alien can also access our courts through federal question jurisdiction. Thus, the D.C. Circuit erred in deciding that the courthouse doors are closed to nonresident aliens.

A. Furthermore, the D.C. Circuit erred in holding that nonresident aliens have no constitutional protections. This Court has decided that nonresident aliens have certain constitutional protections depending on the facts and the right asserted. For example, in *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), this Court held that a nonresident Russian corporation was protected by the Just Compensation Clause and could recover for sea vessels that were expropriated by the United States. Numerous decisions are in similar accord. *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952) ("friendly aliens are protected by the Fifth Amendment requirement of just compensation"); *United States v. Caltex, Inc.*, 344 U.S. 149, 155 (1952) (nonresident friendly alien

may assert a takings claim against the military, but deciding on the merits that no taking occurred); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("aliens shall not . . . be deprived of life, liberty or property without due process of law"); *United States v. Pink*, 315 U.S. 203, 228 (1942) ("aliens as well as citizens are entitled to the protection of the Fifth Amendment"); *Turney v. United States*, 126 Ct. Cl. 202 (1953); *Seery v. United States*, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (permitting taking claim against U.S. Army for expropriations that occurred in occupied Austria in July 1945); *Cardenas v. Smith*, 733 F.2d 909, 915-16 (D.C. Cir. 1984) ("It is beyond peradventure that a foreign nonresident, *non-hostile alien* may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States actions;" citing cases) (emphasis added); *Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974) (rejecting the government's argument that takings do not apply to U.S. action abroad or brought by nonresident alien; deciding on the facts that as a matter of law the U.S. did not "take" the property); *HongKong & Shanghai Banking Corp. v. United States*, 1956 A.M.C. 1446 (Ct. Cl. 1956) (permitting taking claim brought by Hong Kong corporation against the Army and deciding on the merits that no "taking" occurred).

B. By design, the Constitution limits the power of the federal government to the enumerated powers therein and those implied by the need to carry out the enumerated powers. Since *Marbury v. Madison*, it has been the province and duty of this Court to ensure that all branches act within the limits there expressed and decide what those limits are. This Court has recognized that the Constitution imposes limits on the government even when it acts overseas. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957). Such a limitation is not a product of alienage; instead, it is by constitutional design that the power,

authority, and legitimacy of the government is tied to acting in accordance with the limitations imposed on it by the people.

C. When someone — indeed anyone — challenges federal action as being beyond the limits that are imposed by the Constitution, it is the federal courts that are empowered to decide the merits of that challenge. As this Court explained in *Bell v. Hood*, 327 U.S. 678, 681-82 (1946), "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, *the federal court . . . must entertain the suit*." (emphasis added); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (same).

D. Nevertheless, the D.C. Circuit felt constrained by this Court's decisions in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and affirmed the dismissal of Petitioners' complaint for lack of jurisdiction. The D.C. Circuit misunderstood the holdings and import of these two cases.

First, both cases involved what can only be called enemy aliens who attempted to assert claims as enemies of the country. For example, Verdugo-Urquidez was an alleged Mexican drug-lord being prosecuted in the U.S. for drug trafficking during the so-called "drug war." And the plaintiffs in *Eisentrager* were German Nazis engaged in a war against the United States while in Japan.

Second, neither case announced a broad and rigid constitutional principle. Indeed, the Court's opinion in *Verdugo-Urquidez* is very splintered and cautions strongly

against a broad application of the case to other constitutional issues. In particular, this Court explained that the Fifth Amendment was not at issue and functioned differently than the Fourth Amendment, which was at issue. Moreover, Justice Kennedy, the fifth vote in the majority opinion, emphasized that even Vedugo-Urquidez was protected by the Constitution: "[a]ll would agree . . . that the dictates of the *Due Process Clause of the Fifth Amendment* protect [Verdugo-Urquidez]." 494 U.S. at 278 (emphasis added).

Equally, *Johnson v. Eisentrager* did not hold that *all* aliens could not claim the protections of the Fifth Amendment outside the sovereign territory of the U.S. Instead, this Court specifically held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy* engaged in the hostile service of a government at war with the United States." 339 U.S. at 785 (emphasis added). This Court could not have been more clear: it was "*war that exposes the relative vulnerability of the alien's status*." It was war that persuaded this Court that the constitutional guarantees that might have been available were no longer available to persons who were the enemy of the people of the United States; it was not that the people asserting the rights were aliens.

E. Friendly aliens have been permitted to assert constitutional claims and access federal courts since the inception of the federal judiciary. Congress has seen to this. Today, Congress continues to permit aliens to access the federal courts and to bring suits against the United States. It has done so by predicating waivers of sovereign immunity on the kind of claim asserted rather than the alienage of the plaintiff or petitioner. The Tucker Act, the APA or the Federal Tort Claims Act permits a lawsuit against the United States

with a discriminatory proviso that it not be brought by an alien. The D.C. Circuit erred to the extent it precluded all aliens from asserting constitutional protections and other claims in federal courts.

ARGUMENT

I. ALIEN FRIENDS ARE ENTITLED TO ASSERT LEGAL CLAIMS IN UNITED STATES COURTS

Throughout U.S. history our courts, both federal and state, have been open to citizens and foreigners alike, even in times of war and even with regard to ascertaining the constitutionality or legality of actions taken by the United States. For example, in *The Paquette Habana*, 175 U.S. 677 (1900), this Court decided a claim brought against the United States under section 9 of the Judiciary Act of 1789 by nonresident aliens who evidently did not have any property in the United States. This Court decided that the capture of two fishing vessels in foreign waters and sailing under the Spanish flag while America was at war with Spain was illegal and *ordered* that damages be paid to the nonresident aliens. *Id.* at 714. Additionally, the seminal decision of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), involved Virginia's confiscation of Lord Fairfax's estate.

It should come as no surprise that aliens have access to U.S. courts. Indeed, access by aliens to federal courts was of great concern of the Founding Fathers. In THE FEDERALIST (No. 80), Alexander Hamilton wrote:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to

> be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity.

Hamilton's concerns were heeded, and the federal courts were given jurisdiction to hear alien claims. Congress enacted the Judiciary Act of 1789 which, in section 9, provided:

> The district courts shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.[2]

The opinion of former Attorney General William Bradford, published in 1795, addressing the liability of U.S. citizens accused of violating the law of nations, confirms this when he states:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a *remedy* by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where

2. Substantially the same language of the original Act is now the Alien Tort Statute, 28 U.S.C. § 1350.

> an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

1 Op. Att'y Gen. 57, 59, 1795 U.S. AG Lexis 1, *3-*4 (July 6, 1795) (emphasis on remedy supplied). Similarly, in section 11 of the Act, Congress also provided aliens access to the federal courts under diversity jurisdiction.

Thus, whatever the ultimate decision in this case is, it is not the case that aliens cannot have and do not have access to U.S. courts at all. Indeed, the contrary proposition is proved with great frequency whenever foreign corporations and/or nonresident aliens successfully file a lawsuit in federal court.

Instead, the issue is one of whether aliens can ever assert any protection guaranteed by the Constitution. Again, this particular question should be answered by an unqualified "yes."

A. Alien Friends Are Entitled To The Protections Of The Just Compensation Clause

The Just Compensation Clause of the Fifth Amendment — also known as the Takings Clause — provides: "nor shall private property be taken for public use, without just compensation." In *Russian Volunteer Fleet*, 282 U.S. 481 (1931), a nonresident Russian corporation sought to recover just compensation for certain sea vessels that were expropriated by the United States. Like the District Court here, the Court of Claims dismissed the suit for lack of jurisdiction because the plaintiff was an alien. This Court however *unanimously* reversed that decision and held that an "alien friend" is "entitled to the protection of the Fifth Amendment of the Federal Constitution." *Id.* at 489.

This Court went so far as to rule in favor of the plaintiff on the merits, stating "in taking the petitioner's property, the United States became bound to pay just compensation." *Id.*

This Court explained its reasoning as follows:

> The Fifth Amendment gives *to each owner of property his individual right.* The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As *alien friends are embraced within the terms of the Fifth Amendment*, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. *The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments.*

Id. at 491-92 (emphasis added); *see also Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952) ("friendly aliens are protected by the Fifth Amendment requirement of just compensation"); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("aliens shall not . . . be deprived of life, liberty, or property without due process of law"); *United States v. Pink*, 315 U.S. 203, 228 (1942) ("aliens as well as citizens are entitled to the protection of the Fifth Amendment").[3]

3. *See also Becker Steel Co. v. Cummings*, 296 U.S. 74, 79-80 (1935); *Seery v. United States*, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (permitting taking claim against U.S. army for expropriations that occurred in occupied Austria in July 1945); *Cardenas v. Smith*, 733 (Cont'd)

Insofar as relevant to the Question Presented by this Court, the main factual difference between *Russian Volunteer Fleet* and this case is that here the claims all stem from actions that evidently occurred in a foreign land.[4] In *Turney v. United States*, 126 Ct. Cl. 202 (1953), a five-judge panel of the Court of Claims confronted the Takings issue where all actions occurred in a foreign land. In *Turney*, a Philippine corporation acquired radar equipment from the Philippine government. The equipment was among certain surplus assets found by the United States at the Leyte Air Depot following World War II and conveyed to the Philippine government. The new owner of the radar equipment entered into negotiations with the Chinese Air Force. Concerned about national security, the United States objected to the sale and informed the corporation that it would repossess the radar by negotiation or seizure with the aid of the Philippine government.

(Cont'd)
F.2d 909, 915-16 (D.C. Cir. 1984) ("It is beyond peradventure that a foreign nonresident, *non-hostile alien* may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States actions;" citing cases) (emphasis added); *Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974) (rejecting the government's argument that takings do not apply to U.S. action abroad or brought by nonresident alien; deciding on the facts that as a matter of law the U.S. did not "take" the property); *HongKong & Shanghai Banking Corp. v. United States*, 1956 A.M.C. 1446 (Ct. Cl. 1956) (permitting taking claim brought by Hong Kong corporation against the Army and deciding on the merits that no "taking" occurred).

4. *Amici* understand that whether Guantanamo is in a foreign land or under U.S. sovereignty or control is a question that the Court may need to resolve in this case. *Amici* do not intend anything expressed here to be construed as expressing an opinion on the legal status of Guantanamo.

The Philippine government placed an embargo upon the exportation of any surplus materials from the Leyte Air Depot. Not able to export any of its property, the alien corporation negotiated with the United States. It agreed to return the radar equipment in exchange for a full receipt of the material given and a reservation of the right to sue the United States for its losses.

Through a liquidation trustee, Mr. Turney, the Philippine corporation filed suit alleging that a taking had occurred which required just compensation. The court concluded:

> We now consider whether the repossession was a "taking," covered by the Fifth Amendment. We think that it was. The relations, at the time, between our Government and the Philippine Government, were close. Our armed forces had just liberated the Philippines from the Japanese. Our Government had given one hundred million dollars worth of surplus property to the Philippines, including the property at the Leyte Air Depot, and had sold the property for the account of the Philippine Government. When we requested that Government to place an embargo upon the exportation of any of the property, it, naturally, readily complied. That put irresistible pressure upon the corporation to come to terms with the United States Army, the terms being that the radar equipment would be segregated in charge of the Army and would not be disposed of until a final agreement was reached as to its disposition. The final agreement turned the property back to the army in exchange for a receipt, and with a reservation of the right to sue for its value.

> We think that the taking occurred on October 13, 1947, when the Army officially took possession of the property. The plaintiff is entitled to recover its fair value as of that date, with interest added as a part of just compensation.

Turney, 126 Ct. Cl. at 214. The court expressly rejected the argument that the Just Compensation Clause does not apply in foreign countries. *Id.* at 215. The court followed the *Russian Volunteer Fleet* holding and applied it to permit a nonresident alien friend to assert a Fifth Amendment claim against the United States even though the taking occurred in a foreign country. *Id.* The court's reasoning was straightforward: because both alien friends and citizens are protected by the Just Compensation Clause, and because courts have permitted U.S. citizens to assert claims for property taken in foreign lands, alien friends may also assert such claims. *Id.*

Similarly, in *Caltex (Philippines), Inc. v. United States*, 100 F. Supp. 970, 979 (Ct. Cl. 1951), the Court of Claims permitted a taking claim against the U.S. to be brought by nonresident aliens. On appeal, this Court reversed the decision explaining that no compensable taking occurs when the military acts to destroy potentially valuable enemy assets that could be used to wage war against the U.S. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 155 (1952). Significantly, though only two years after *Eisentrager*, this Court simultaneously acknowledged that under some circumstances a taking claim might be permitted. "No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts." *Id.* at 156.

Thus, there is little merit to the D.C. Circuit's broad statement that nonresident aliens have no constitutional protections. Indeed, even the U.S. has argued to this Court that aliens enjoy some constitutional protections.

> Congress's plenary power over aliens does not, however, render the Due Process Clause of the Fifth Amendment altogether inapplicable to petitioner. As the court of appeals acknowledged, petitioner and other aliens "can of course claim some constitutional protections." J.A. 207 (also noting that, under Fifth Circuit precedent, even excludable aliens who fail to effect an entry into the United States are considered persons entitled to protection under the Fourteenth Amendment (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1375 (1987)). *Cf. Jean v. Nelson*, 472 U.S. 846 (1985) (remanding for consideration of how discretion was exercised under statute and declining to reach constitutional issue of whether Fifth Amendment applies to consideration of unadmitted aliens for parole); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that alien children who were not legally admitted into United States were "persons" entitled to claim benefit of Equal Protection Clause of Fourteenth Amendment).

U.S. *Brief*, *Kestutis Zadvydas v. Lynne Underdown and Immigration And Naturalization Service*, 1999 U.S. Briefs 7791, at *34 (2001).

Consequently, the issue of whether and when an alien may assert a protection offered by the Constitution should be handled on a case-by-case basis, amendment-by-

amendment or perhaps clause-by-clause. The issue should not be decided, as the D.C. Circuit has, using a one-size fits all rule predicated solely on the basis of "property or presence in this country." To the contrary, the D.C. Circuit's overly broad interpretation of this Court's jurisprudence and rigid rule for all constitutional issues, if affirmed, would overrule this Court's long-standing precedent as applied to amendments not at issue in this case, as well as undermine the constitutional design that the people created with a federal government of specifically enumerated and limited powers.

B. The Federal Government Possesses Specifically Enumerated Powers That Are, At Times, Enforced By Federal Courts Even When The Government's Actions Occur In Foreign Lands

One of the first principles of our great country is that the federal government is limited in its power; limited to those powers specifically granted it by the people.[5] The purpose and design of the Constitution requires adherence to retaining the divisions of power. Indeed, as this Court has repeatedly explained, the constitutionally-mandated division of the people's sovereign powers is integral to preventing tyranny and was adopted by the Framers of the Constitution to protect our fundamental liberties.

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5. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted."); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers."); *see also* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

The D.C. Circuit's ruling threatens an unprecedented feat of granting the Judicial power to say what the law is to the Executive without once endeavoring to explain the authority under the Constitution that provides such authority to the President. Though it may not seem so today, it is beyond dispute that the Framers were distrustful of Executive power and limited the President's authority to ensure it was not kingly. Indeed, Madison emphasized at the Constitutional Convention that the Framers intended "to fix the extent of the executive authority," not confer open-ended powers. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (M. Farrand ed. 1937). Madison added, "executive powers [should] be confined and defined — if large we shall have the Evils of elective Monarchies." *Id.* at 70. And, when Congress or the Executive acts beyond the scope of its enumerated powers, therefore, it acts without constitutional authority, that is, tyrannically, and places liberty at risk. In such circumstances, it is incumbent on this Court to restrain the conduct, even when it occurs overseas.

As this Court is well aware, the federal government's power is limited even as applied to its actions in foreign lands or affecting aliens. Indeed, in *Reid v. Covert*, 354 U.S. 1, 5-6 (1957), this Court explained: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *See also id.* at 56 (Frankfurter, J., concurring) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution."); *cf. id.* at 66 (Harlan, J., concurring) (same).[6]

6. *See also Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) ("The government . . . can claim no powers which are (Cont'd)

It was in *Reid* that this Court took a major step in the development of extraterritorial constitutional application when it held that the Constitution controls government actions taken abroad. In *Reid*, a United States military tribunal in England tried an American civilian for the murder of her husband, an Air Force officer. The murder was committed on an Air Force base in England. In noting that the Constitution applied to government actions in foreign lands, Justice Black explicitly relied upon the enumerated powers doctrine. In *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), the *Reid* plurality garnered a majority.

Since *Reid*, the argument that the Constitution has territorial limits has been rejected when U.S. citizens invoke their rights. As to the prior cases (*e.g.*, the *Insular Cases* and *In re Ross*), this Court explained: "it is our judgment that neither the cases nor their reasoning should be given any further expansion." *Reid*, 354 U.S. at 14; *see also id.* at 12 ("The *Ross* approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases. . . . At best, the *Ross* case should be left as a relic from a different era."); *id.* at 56 (Frankfurter, J.) ("Insofar as [*Ross*] expressed a view that the Constitution is not operative outside the United States . . . it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution").

The D.C. Circuit Court of Appeals has also shown its willingness to entertain and adjudicate constitutional issues

(Cont'd)
not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (same).

under the Just Compensation Clause, even though the actions involved U.S. military matters that occurred in a foreign land. In *Ramirez de Arellano v. Weinberger*, an en banc panel of the Court of Appeals for the D.C. Circuit held that the adjudication of whether the military may run operations on a U.S. citizen's private property in a foreign country that had not yet been appropriated did not present a nonjusticiable political question despite the United States arguing that it did, and the district court finding that the suit presented a direct challenge to the propriety of the U.S. military presence in Central America. 745 F.2d 1500, 1512 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113 (1985). In particular, the court explained:

> Not every issue related to foreign relations, however, is constitutionally committed for resolution by the Executive. *Baker v. Carr* states that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Issues which are not at base sweeping challenges to the Executive's foreign policy typically are adjudicated by the courts because they do not involve judicial usurpation of the Executive's constitutional powers to manage foreign affairs.
>
> A careful analysis of the plaintiffs' case shows that their claims are not exclusively committed for resolution to the political branches. . . . [T]he plaintiffs do not seek to adjudicate the lawfulness of the United States military presence abroad. Instead, they seek adjudication of the narrow issue whether the United States defendants may run military exercises throughout the plaintiffs'

> private pastures when their land has not been lawfully expropriated. They do not challenge the United States military presence in Honduras. . . . Plaintiffs' claim, properly understood, is narrowly focused on the lawfulness of the United States defendants' occupation and use of the plaintiffs' cattle ranch.
>
> This is a paradigmatic issue for resolution by the Judiciary.

Id.; *see also Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983) (Scalia, J.)

> To be sure, because this case involves land in Central America, and because United States military activities in that region are currently the subject of national interest and debate, the issue is presented in a more politically charged context. That may make it, in a sense, a political case — but as the Court noted in *Baker v. Carr* . . . 'the doctrine . . . is one of "political questions," not one of "political cases." '

Thus, unless this Court is to overturn *Reid* and *Kinsella* and other cases, it cannot be the case that simply because the U.S. actions at issue occurred outside the United States renders the Constitution inapplicable or precludes a court from entertaining constitutional questions. Instead, the only principled manner in which the constitutional issue can be decided must be based on the status of the individual asserting the particular right and the purpose the particular constitutional right was intended to protect. However, the final arbiter of that decision — of whether aliens may assert

a particular constitutional protection — must be the federal courts unless the new millennium has brought about the demise of *Marbury v. Madison* and given the Executive the power to say what the law is.

C. Federal Jurisdiction Is Apparent Here Because Constitutional Claims Are Alleged

Just like all branches of the federal government, according to constitutional design the federal courts are also limited in their power. Indeed, federal courts are often referred to as courts of limited jurisdiction. Naturally, jurisdiction is essential to the legitimacy of any exercise of judicial power. The consequence of being without jurisdiction is that a federal court is without any authority or legitimacy. As this Court recently stated: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment — which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. . . . Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. . . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.

Steel Co., 523 U.S. at 101-02 (citations omitted).[7]

This Court has also long settled the debate of whether constitutional issues provide federal jurisdiction. In *Bell v. Hood*, 327 U.S. 678, 681-82 (1946), this Court explained that "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, *the federal court*, but for two possible exceptions later noted, *must entertain the suit*." (emphasis added); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (same). The two exceptions this Court referred to in *Bell v. Hood* are: (i) "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction" and (ii) "where such a claim is wholly insubstantial and frivolous." *Id.* at 682-83. Today, the reasons where this Court permits a dismissal for lack of jurisdiction perhaps has expanded and can perhaps be rephrased to include those claims that are "so insubstantial . . . [or] implausible . . . [or] foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). Whatever the exact parameters of a valid dismissal of a constitutional claim for lack of jurisdiction

7. The D.C. Circuit affirmed a dismissal that was *with prejudice*. The decision of this Court in *Steel Co.* evidences that the "with prejudice" ruling of the District Court must be reversed; only decisions on the merits and within the jurisdiction of the court can be with prejudice.

are, one thing is clear: this Court has not decided the particular constitutional issue presented here. Therefore, under *Bell*, there is federal jurisdiction to decide the constitutional claims asserted.

Nevertheless, the D.C. Circuit felt itself constrained by circuit precedent and upheld the district court's dismissal for lack of jurisdiction. The error of the D.C. Circuit was based on a misunderstanding or misreading of two cases: (i) *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and (ii) *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

D. Neither *United States v. Verdugo-Urquidez* Nor *Johnson v. Eisentrager* Announced A Rigid Rule Of Constitutional Law That Aliens Are Not Entitled To Assert Constitutional Claims

This Court's decision in *Verdugo-Urquidez* is a splintered opinion that cautions against broad interpretation of rigid constitutional principles. Indeed, this Court went to great lengths to explain that it was a case anchored to its specific facts; a limitation that the D.C. Circuit's broad ruling threatens to unmoor. For example, this Court expressly emphasized that the case that was before it was a different kind of case, involving a different history and operation than the Fifth Amendment. *See id.* at 264 ("Before analyzing the scope of the Fourth Amendment, *we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case.*") (emphasis added). And, like *Eisentrager*, it was a case brought by an enemy of the United States.

Verdugo-Urquidez was an alleged Mexican drug-lord being prosecuted in the U.S. for drug trafficking. By the time

the case came to the Court, Verdugo-Urquidez had been convicted, in a separate prosecution, for his involvement in the torture and murder of DEA agent Enrique Camarena Salazar. 494 U.S. at 262. He thus was, for all practical purposes, a nonresident *enemy alien* of the United States. He had been seized by Mexican police in Mexico and delivered into American custody at the California/Mexico border. The next day, while he was incarcerated in San Diego, DEA agents, in concert with Mexican police, searched his home in Mexico and found business records of his narcotics smuggling enterprise. A divided Ninth Circuit panel suppressed this evidence as having been seized in violation of the Warrant Clause of the Fourth Amendment. This Court reversed, with six Justices (in three different opinions) agreeing that the search should be upheld as constitutional but for different reasons. Three Justices dissented. And although Chief Justice Rehnquist's opinion was the "Opinion of the Court" as Justice Kennedy concurred in it, Justice Kennedy's concurrence diverges so greatly from Chief Justice Rehnquist's analysis that Chief Justice Rehnquist's opinion seems to be speaking for a plurality of four.

The majority opinion held that the enemy alien in the case had no constitutional protection against the actions taken by the United States in foreign countries that did or would have otherwise implicated the search and seizure clause of the Fourth Amendment. *Id.* at 261. Significantly, this Court did not hold that Verdugo-Urquidez had no Fourth Amendment rights at all, or that he could not assert such a legal claim; only that under the facts and circumstances, the Fourth Amendment protections afforded by the search and seizure or warrant clause did not protect him. Indeed, Justice Kennedy specifically rejected such a rigid assertion that nonresident aliens have no constitutional protections.

See id. at 276-78. As but one example of the constitutional protections even a nonresident, criminal and enemy alien would have, Justice Kennedy emphasized that "[a]ll would agree . . . that the dictates of the *Due Process Clause of the Fifth Amendment* protect [Verdugo-Urquidez]." *Id.* at 278 (emphasis added).[8]

Aside from this Court's express emphasis that the case was a different kind of case, involving a different history and operation than the Fifth Amendment, *id.* at 264, this Court also noted that the decision was reached in part because the Fourth Amendment includes a "term of art" that is not included in the Fifth Amendment. *Id* at 264-66. The Fifth Amendment, in contrast to the Fourth, applies to "persons" which this Court has held includes alien friends. *See supra.*[9] Thus, even if *Verdugo-Urquidez* can be seen as providing a new constitutional principle applicable to aliens, it does not overrule *Russian Volunteer Fleet* and the other cases cited above that specifically address the Just Compensation Clause or other Fifth Amendment issues.

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8. Justice Kennedy adopted the view espoused by Justice Harlan in *Reid*, that the question of what the Constitution requires abroad "can be reduced to the issue of what process is 'due' a defendant *in the particular circumstances of a particular case.*" *Id.* at 270 (emphasis added).

9. Another difference between the Fourth Amendment and the Just Compensation Clause is that the Just Compensation Clause addresses "private property" and not "the people" or "persons", and it expressly requires the government to pay compensation whenever private property is taken for public use except, as this Court has declared, under some circumstances during wartime. *See supra.* There are several additional differences that would require many more pages to explain. For present purposes, *amici* simply point out that the Just Compensation Clause is different, serves a different purpose and has a different history than the Fourth Amendment.

Equally, *Johnson v. Eisentrager* is of little assistance to the D.C. Circuit's ruling. Like *Verdugo-Urquidez*, *Johnson v. Eisentrager* involved an enemy alien in the criminal context. Moreover, *Johnson v. Eisentrager* did not hold that *all* aliens could not claim the protections of the Fifth Amendment outside the sovereign territory of the U.S. Instead, this Court specifically held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy* engaged in the hostile service of a government at war with the United States." *Id.* at 785 (emphasis added). In particular, this Court emphasized and explained that it was the fact that the person's country was actively waging war against the U.S. that was critical to the legal reasoning:

> *It is war that exposes the relative vulnerability of the alien's status.* The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. . . . But *disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage.*

Id. at 771-72 (emphasis added).

Amici thus assert that the critical factual issue in both *Verdugo-Urquidez* and *Johnson v. Eisentrager* is that the alien asserting the protection of the Constitution was an enemy of the United States. This is the long-standing rule of law, which was lost on the D.C. Circuit, that should be recognized again. Indeed, it was this distinction that was critical to this Court's

takings jurisprudence that involved the Civil War as well as the other takings cases cited above involving aliens. As this Court explained in *United States v. Pacific Railroad Co.*, 120 U.S. 227, 233, 239 (1887):

> The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. . . . The inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other.

It is the incident of war that changes everything; it is not alienage.

E. Federal Courts Are Open To Aliens To Assert Legal Claims

In one portion of its ruling, the D.C. Circuit also explains that "the [federal] courts are not open to" Petitioners, which includes individuals that the court considered nonresident alien friends. To the extent that this Court considers the Question Presented as being one about whether the federal courts are open to Petitioners to challenge the legality of the detention at all and under any circumstance or with any legal claim, then the answer to that question is again "yes."

Nonresident aliens may assert damage claims and other claims against the United States under the Tucker Act.[10] In relevant part, the Tucker Act provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon *any claim against the United States* founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491 (emphasis added). Presumably, this congressional waiver of sovereign immunity would permit an alien and citizen alike to assert claims against the United States. Indeed, whether the lawsuit can be brought turns upon the claim, not the alienage of the person asserting the claim. As this Court has explained; "[I]f a *claim* falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (emphasis added). Similarly, the Federal Tort Claims Act and the Administrative Procedures Act ("APA") do not prohibit aliens from filing lawsuits against the United States in federal court. Instead, the Federal Tort Claims Act and the APA both draw the distinction on kinds of claims; neither precludes a lawsuit based on the alienage of the plaintiff. Indeed, as was explained above, aliens have been entitled to access the federal courts since the federal courts were created.

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10. Under the terms of the so-called "Little Tucker Act," the Tucker Act also provides concurrent jurisdiction in U.S. District Courts over claims not exceeding $10,000. 28 U.S.C. § 1346(a)(2).

Finally, there is no reason to discourage lawsuits brought by alien friends against the United States from being brought in U.S. courts. To the extent that such lawsuits are initiated at all, it makes more sense to encourage such lawsuits to be brought in U.S. courts rather than in courts where the aliens reside. Judgments obtained in foreign lands or in specific International courts would likely be unenforceable in the United States, especially money judgments. Therefore, to the extent that the D.C. Circuit's opinion is read as closing the federal courthouse doors to all nonresident aliens the ruling was erroneous.

CONCLUSION

Amici respectfully request that this Court reverse the decision of the D.C. Circuit.

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